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No. 81-2333

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

WARREN M. ANDERSON,
JAY P. ROLISON, JR.,
JAMES L. EMERY, and the
SENATE OF THE STATE OF NEW YORK

Appellants,

v.

JOHN FLATEAU, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS AND/OR AFFIRM

C. Daniel Chill
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July 16, 1982

(12328)

QUESTIONS PRESENTED

1. Whether the Federal District Court below properly found New York's then existing state legislative lines violative of the equal population requirements of the 14th Amendment to the United States Constitution and whether it properly exercised its discretion in not permitting the use of such unconstitutional lines for the 1982 elections.

MOTION TO DISMISS AND/OR AFFIRM

Appellee, Stanley Fink, in the above entitled cause moves to dismiss and/or affirm on the ground that it is manifest that the questions on which the decision of this cause depends are moot and on the further ground that they are so unsubstantial as not to need further argument.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS AND OR AFFIRM

COUNTERSTATEMENT OF THE CASE

This appeal has been filed by defendant-appellants, the New York State Senate and its leadership seeking to overturn the order of the three judge court below, which enjoined the then existing State Senate and Assembly district lines from being

employed to conduct any election for terms commencing on or after January 1, 1983 and directed that New York devise and enact a new reapportionment plan for the State Senate and Assembly.

The case is moot because, as appellants themselves concede, "the New York State Legislature subsequently did enact a reapportionment plan" based on the 1980 census figures.

Furthermore, the issues presented are neither novel nor substantial. Essentially, appellants do not argue with the lower courts decision that the former lines drawn pursuant to the 1970 census were invalid as violative of the 14th Amendment. They simply quarrel with the courts remedy claiming that the court did not give the legislature enough time to redraw the lines. As such, there is no dispute with the courts *legal* conclusion that the former districts were unconstitutional pursuant to *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and its progeny. Appellants sole dispute is with the courts *remedy* of ordering new lines in place for the 1982 elections. We submit that the lower court's action was an appropriate exercise of authority and discretion under the law and circumstances of this case and clearly present no novel or substantial issues of law.

The court below carefully examined appellants contentions, balanced the competing claims and in the exercise of its discretion felt that a new and constitutional reapportionment plan could and should be adopted in New York in time for the 1982 elections. In fact, time proved the three judge court correct. New lines based on substantially equal districts pursuant to the 1980 census were in place and the 1982 elections will be held in New York State on properly redrawn constitutional lines.

In both the statement of Prior Proceedings and in the argument part of the Jurisdictional Statement, appellants contend that complex New York State Constitutional requirements made the adoption of new districts too difficult to be done in 1982. To support that argument they cited a series of three different State court challenges to the new reapportionment plan. Appellants neglected to inform the court, however, that *prior* to the filing of

their Jurisdictional Statement, all of these state court proceedings were consolidated, all of the complaints were dismissed and summary judgment was granted the defendants adjudicating the legislative plan as constitutional and valid under the United States and New York State Constitutions.

POINT I

THE PASSAGE BY THE NEW YORK STATE LEGISLATURE OF A NEW REDISTRICTING PLAN BASED ON 1980 CENSUS FIGURES HAS RENDERED THE CONTROVERSY MOOT AND NO ACTUAL CONTROVERSY NOW EXISTS

It is conceded that subsequent to the lower court's decision New York State has now enacted into law a new reapportionment statute based on 1980 census figures. This law repeals the old New York State reapportionment statute which was the subject of the lower courts order being appealed from herein. As such, there is no longer an actual controversy at this stage of appellate review. The Supreme Court has held in *Roe* v. *Wade*, 410 U.S. 113, 125 (1973):

> ". . . The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.

The Court cited an earlier case *Golden* v. *Zwickler*, 394 U.S. 103,110 (1969), which reversed the lower court, stating:

> "No federal court, whether this Court or a district court, has "jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*"
> (Emphasis the Court's)

Accordingly, since there is no actual controversy extant as of this appeal,* the appeal should be dismissed as moot.

POINT II

APPELLANTS HAVE PRESENTED NO SUBSTANTIAL OR NOVEL QUESTIONS OF LAW

Not only have appellants presented no substantial or novel questions of law, they have presented no constitutional question at all. Indeed, appellants would have this Court create, *ex nihilo*, a new constitutional rule, that as a matter of federal constitutional law a local legislative body *must* be given more than two years to reapportion after the Decennial Census. According to the argument advanced by appellants herein, a Federal District Court may not constitutionally order a reapportionment prior to two years after the Decennial Census. For this bizarre proposition, appellants offer no precedent other than the general proposition that reapportionment is "primarily a matter for legislative consideration" and that "technical" and "political" difficulties make earlier reapportionment difficult.

Totally ignored by appellants is the recognition that the Court below bowed to the legislative prerogative above and beyond the call of duty. In every single one of the orders issued in this case, the Court exhorted the legislature to continue negotiations toward legislative enactment of reapportionment plans so as to avoid judicial intervention. Finally, given no choice by an obdurate legislature, the Court below was compelled by the constitutional principals enunciated in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and its progeny to commence the reapportionment process itself.

Given the uncontradicted finding of the three-judge Court:

> "that the maximum positive and negative percentage deviations from the population means for the State

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* By order dated July 7, 1982, the lower court ordered the new legislative plan into place for the 1982 elections. Said order is made a part hereof as Exhibit I.

Senate and Assembly districts as presently constituted are as follows:

District	*Percentage Deviation From Population Means*	*Maximum Percentage Deviation*
Senate #1	48.91	84.73
Senate #2	35.84	
Assembly #1	51.91	109.00
Assembly #2	−57.09	

and the applicants' concession:

> "that if a legislative reapportionment plan for the State Assembly and Senate were enacted today which contained such deviations from the population means, it would violate the Equal Protection Clause of the Fourteenth Amendment. *See* Stipulation 15 of Stipulation of Facts."

(A-11)*

the Court below was compelled to act as it did. The Court below stated:

> "As the Supreme Court reasoned in *Reynolds* v. *Sims*, once a plan has been found unconstitutional, 'it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.' 377 U.S. at 585."

(A-20)

Appellants assert that the lower Court in its order failed to consider such factors as when census data first became available, problems with Federal and State Constitutional requirements and the need for time to discuss, negotiate and compromise

* References are to Appellants Appendix.

conflicting political interests. We submit that these bald conclusory claims are simply unsupported by the record in this case. The Court below, in its opinion, acknowledged "that the New York State Constitution does set vigorous requirements with respect to reapportionment and that as a practical matter apportionment is subject to preclearance by the Attorney General of the United States or the District Court of the District of Columbia pursuant to 42 U.S.C. (1973c)" (A15). The Court below further acknowledged that the state certainly has interests in "sovereignty and self-government" and that "apportionment is a political and legislative process with respect to which judicial caution is indicated." (A18).

However, says the Court, after analysing the record before it:

> "*Defendants have, however, presented no strong or convincing reasons why reapportionment should not be accomplished in time for the 1982 general elections. They do not assert that immediate reapportionment is impossible. They, instead, rely on tradition.* They argue that reapportionment ought not be accomplished this year because '[t]he tradition of New York State has been that reapportionment had [sic] not occurred until after the first election in the decade and until the third year of the decade." Transcript of Argument, March 26, 1982 at 45.
>
> *In New York we are faced with deviations as much as five times greater than the largest deviations that the Supreme Court has found to pass constitutional muster in newly enacted apportionment plans. Given these variations, and defendants' failure to present any compelling justification for delay, we conclude that the Equal Protection Clause of the Fourteenth Amendment, in conjunction with the Supremacy Clause of Article 6 of the United States Constitution, mandates immediate reapportionment.*"
> (Emphasis added)

(A 18-19)

Still, the Court stayed its hand giving the legislature another chance to fulfill the legislative responsibility that it had so cavalierly abdicated.

Appellants who control the State Senate of the State of New York refused to act after the initial March 26, 1982 order of the Court below. Instead, citing "technical" and "political" difficulties as their sole justification, they sought stays from the lower court, Justice Marshall and the full Supreme Court, all of which were denied. By some perverse alchemy, appellants sought to transmute the dross of technical difficulties into some new golden constitutional rule that they claim should have been adopted by the Supreme Court.

We respectfully submit that there were no technical difficulties in passing a reapportionment plan in New York State. What was lacking was not the technical means to complete this task but appellant's lack of political will to do so. The record below belies applicants claim that the Court was unaware of the technical difficulties involved. In footnote 18 (A 19) the lower Court noted that "New York enacted a reapportionment plan based on the 1970 census in 1972." All of this was accomplished in 1971 and 1972 without the sophisticated computer equipment and staff presently available to the legislative leadership. If the state legislature was able to reapportion in 1971-72 immediately after the decennial census, a fortiori, it could have been done in 1982 on the basis of the 1980 census as well. Indeed, under pressure from the lower court, appellants joined with the Assembly to enact into law a new legislative reapportionment plan based on 1980 census data that passes State and Federal Constitutional muster.

Furthermore, in their motion papers in support of their motion for summary judgment, appellants boasted proudly to the lower Court that in 1972, despite the complexities involved, they were able to accomplish reapportionment in time for the 1972 elections. The following is quoted verbatim from appellants Rule 3(g) Statement of Material Facts (Rules of the Southern District of New York) submitted to the lower court, on March 16, 1982:

> "In 1972, the new Article 8 of the State Law promulgated a legislative districting plan that had an overall

deviation of less than 5600 'inhabitants' in the Senate (the mean being 304,021) and less than 4200 in the Assembly (the mean being 121,608). These deviations, 1.83% and 3.39% respectively, are legal light years away from the prima facie standard of 10% deviation under the decided cases. *New York achieved this 'super equality' despite a detailed and complex set of state constitutional districting rules.* The plan was the product of the input of both major political parties and could not have been passed without the support of members from both sides of the aisle.

To reapportion and redistrict in the 1980's, New York State has gone to considerable expense and effort to receive, adopt and program the census data into a form which can be used to prepare plans valid under Federal and State law. *Despite the complications of the task, and the brief interlude that has elapsed since the data has been fit to be used, there exists now a proposed plan of defendants to redistrict the Legislature with detailed descriptions.*"
(Emphasis added)

Also attached to appellants moving papers of March 16, 1982 was an affidavit of defendant-appellant Jay Rolison sworn to in support of appellants motion for Summary Judgment in which Senator Rolison states:

"6. *In 1972, a plan for new Legislative districts was enacted using the data from the 1970 census.* Although the Legislature at that time had Republican majorities in both houses, in fact, *the plan was the product of suggestions made by elected and party officials of both parties.*

7. The cooperative bipartisan effort which produced the 1968 and 1972 plans was anticipated to be extended to the redistricting in the '80s. From 1975 to date, the Legislature has been divided between a Democratic majority in the Assembly and a Republican majority in the Senate.

8. LATFOR* was created in 1979 with an initial funding of $1,500,000. From the first, its meetings were characterized by a spirit of cooperation. A staff was recruited, equipment and software purchased. *LATFOR, near the close of 1980, stood poised to undertake the task of creating a Congressional and Legislative plan when census material would be delivered in 1981.*

13. *On February 8, 1982, a complete set of Congressional, Senate and Assembly district lines were distributed, as were statewide maps of all 3 plans, for Congress, the Senate and the Assembly.*

14. *On March 3, 1982, the Senate passed a Congressional districting bill."*
(Emphasis added)

Query, if as appellants contend, there are so many technical difficulties attendant on reapportionment, how were appellants able to pass a valid Congressional bill as well as have prepared for passage valid legislative reapportionment bills as stated by Senator Rolison.

As the Court closest to the facts contained in the record before it (of which the above quoted paragraphs are but a part), the decision of the Court below is entitled to a presumption of validity.

All of the conflicting claims were before the Court when it undertook the prudent parallel course of undertaking Court drawn reapportionment while, at the same time, leaving open to the legislature the continuing option to do its own plan, an option finally exercised by the Legislature in time for 1982 elections.

Appellants reliance on constitutional challenges to the legislatives new lines in state court as indicative of undue haste in the enactment of such lines is misplaced.

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* Legislative Advisory Task Force on Reapportionment, a bipartisan commission created by the legislature as a technical aid in reapportionment.

As previously noted, *prior* to the filing of this Jurisdictional Statement, appellants who participated in the state court actions were aware that all of these state court challenges had been consolidated and dismissed and that the legislative plans had been adjudicated to be constitutional and valid.

POINT III

STATE CONSTITUTIONAL REQUIREMENTS CANNOT BE USED AS AN EXCUSE TO ABROGATE SUPERIOR FEDERAL CONSTITUTIONAL REQUIREMENTS

It is pellucidly clear, when one reviews the history of this case, that the failure to reapportion derived from appellants mistaken belief that the New York State Constitution permitted them up to six (6) years after the Decennial Census to reapportion the State legislature. Consequently, argued appellants in the Court below, the New York State Constitution could be interposed to vitiate vital Federal Constitutional rights guaranteed to plaintiffs by the Equal Protection Clause of the Fourteenth Amendment.*

The lower Court gave this argument short shrift concluding that given the vast population variations in the present districts and:

> "*defendants' failure to present any compelling justification for delay*, we conclude that the Equal Protection Clause of the Fourteenth Amendment, in conjunction with the Supremacy Clause of Article 6 of the United States Constitution, mandates immediate reapportionment. *Reynolds* v. *Sims*, *supra*, 377 U.S. at 583-584; *Goines* v. *Rockefeller*, 338 F.Supp. 1189, 1195 (S.D. W.Va. 1972); *Bennett* v. *Elliott*, 294 F.Supp. 808, 810 (M.D. Tenn. 1968)."
> (Emphasis added)

(A 19-20)

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* While Appellants do not press this argument before this court, it was a linchpin of their brief in the lower court.

The Court below was eminently correct. *McCulloch* v. *Maryland* 4 Wheat 316 (1819) settled the supremacy question a long time ago. In *Katzenbach* v. *Morgan*, 384 US 641, 647 (1966) the Court stated:

> "But, of course, the states have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. *Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action.* The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote." (Emphasis added)

Moreover, prior Supreme Court decisions do not permit any state statute, or legitimate state interest, even when enacted by a state referendum, to circumvent the Fourteenth Amendment's Voting Rights protections. *Lucas* v. *44th General Assembly of Colorado*, 377 U.S. 713 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); See also *Reynolds* v. *Sims*, *supra*; *Goines* v. *Rockefeller*, 338 F.Supp. 1189, 1195 (S.D. W.Va. 1972).

In *Lucas*, *supra*, the defendant sought to justify a malapportioned legislature on the grounds that the voters of the State of Colorado had voted in favor of the scheme that permitted malapportionment of one of the houses of the Colorado legislature. Even though the Colorado electorate had approved the scheme, the Supreme Court over-turned the Colorado apportionment plan stating:

> "... A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds* v. *Sims*, 377 U.S. 533 (1964)."

In *Roman, supra*, the Supreme Court invalidated a substantially malapportioned state reapportionment plan which violated the Equal Protection provision of the Fourteenth Amendment, notwithstanding the fact that it was properly drawn according to a recent amendment to the Delaware State Constitution.

It cannot be gainsaid that applicants contentions are totally devoid of merit. E.J. Dionne, Jr., reporter for the New York Times, recognized in a feature article in the Sunday's New York Times, News of the Week in Review (April 26, 1982):

> "The Republicans want to draw Congressional lines only, and put the Legislature's boundaries off until next year—when there just might be a Republican in the Executive Mansion. *Which only underscored what most politicians knew all along: The hard part about drawing district boundaries usually is not technical, but partisan.*"
> (Emphasis added)

The sole ingredient missing was the political ingredient of appellants lack of desire to pass a new reapportionment plan. The impasse in the legislature was political not technical and the lower court acted in a perfectly appropriate manner to breach this impasse.

Appellee Fink, Speaker of the Assembly, was not one whit less reluctant to surrender the political power attendant on reapportionment than was appellant Senator Anderson, Majority Leader of the Senate. Nevertheless, he recognized that the public interest demanded compliance with the supreme law of the land which mandated that the lower Court directly enter into the political thicket of reapportionment, albeit reluctantly, without further delay.

CONCLUSION

The arguments made by the appellants relate to no actual controversy. They also present no substantial or novel question for the decision of this Court. The District Court's opinion below is so obviously correct as to warrant no further review. We respectfully request that the appeal should be dismissed or, in the alternative, that the decision of the District Court be affirmed.

Respectfully submitted,

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July , 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JOHN FLATEAU, et al.,
Plaintiffs,
-against-
WARREN M. ANDERSON, et al.,
Defendants.

82 Civ. 876

ORDER

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LAWRENCE W. PIERCE, Circuit Judge
ROBERT J. WARD, District Judge
VINCENT L. BRODERICK, District Judge

Throughout this action the Court has recognized that reapportionment is a legislative obligation. Since March 26, 1982, when the first court proceeding was held in this matter, every effort of this Court has been directed toward requiring and encouraging the New York State Legislature to adopt reapportionment plans which will make it possible for the voters of New York to vote on November 2, 1982 for candidates for Congress, for the Assembly, and for the State Senate from districts which are based on 1980 census data, and which conform to the requirements of federal constitutional and statutory law and, to the extent consistent therewith, to the constitutional and statutory requirements of the State of New York.

When, at a hearing on April 19, 1982, the parties informed the Court that the State Legislature had failed to adopt such plans, the Court announced its intention to appoint a Special Master to devise such apportionment plans, but it directed the State Legislature to continue its efforts to devise and enact its own apportionment plans.

The Special Master appointed by the Court on April 23, 1982, Robert P. Patterson, Jr., rapidly assembled a staff and with it worked tirelessly to submit to the Court on June 7, 1982 proposed plans for the redistricting of the State. In the meantime

the State Legislature had devised and the State had enacted reapportionment plans for Congressional, Assembly and State Senate districts which, as to the Counties of New York, the Bronx and Kings ("the Covered Counties") had been submitted to the Attorney General of the United States for clearance under Section 5 of the Federal Voting Rights Act.

At a proceeding held herein on June 10, 1982, the Court received comments on the Special Master's plan. The Court urged the Attorney General to expedite its review of the State's submission to it, and continued what had become a two-track approach to apportionment, deferring any definitive action until after the Attorney General had completed his review.

At the next proceeding of the Court on June 21, 1982 no decision had yet been received from the Attorney General with respect to the Covered Counties. The Court had directed, since the June 10, 1982 hearing, that steps be taken to facilitate the implementation of the Special Master's plans by the boards of election of New York, but beyond receiving further comments on the Special Master's Report and the Special Master's response thereto, action was deferred.

On June 22 the Attorney General interposed objections to New York State's reapportionment plans for the Covered Counties. Legislation was enacted by the State of New York postponing the commencement of the 1982 Election Calendar from June 22, 1982 (when the period for primary petitioning had been scheduled to begin) to July 6, 1982, and postponing the primary election from September 14 to September 23.

At a proceeding on June 23, 1982 State Legislative representatives reported that they intended promptly to address the Attorney General's objections, and the Assistant Attorney General in charge of the Civil Rights Division indicated his willingness to act promptly with respect to any further submissions from the State.

Unsure, however, of the outcome of negotiations between the State and the Department of Justice, and acutely aware of time constraints, the Court directed the Special Master to reassess

and modify, if necessary, his proposed plans for the covered and adjacent counties in light of the comments and objections of the Department of Justice to the State-enacted plans as well as the comments of the parties. The Special Master was also directed to integrate such plans for the covered and adjacent counties with the State-enacted plans for the rest of the State to the extent these plans were constitutional. Otherwise the Court deferred action.

Thereafter the State Legislature enacted and the Governor approved revised apportionment plans. The revisions took into account not only the objections made by the Attorney General with respect to the Covered Counties, but also comments made in the course of proceedings herein and comments received by the Court and the Special Master with respect to other parts of the State, notably Queens County, Westchester County and Monroe County.

On July 3, 1982 the Attorney General notified the State of New York that, subject to further consideration based on comments received by him during the 60-day period subsequent to submission of the State's revised apportionment plans, he would not interpose objections thereto.

At a proceeding yesterday the Court received reports with respect to the State's readiness at this juncture to proceed into the election process in accordance with its own plans. It also received the Special Master's modified plans. It has also received the transcript of a hearing held by the Special Master at the Court's direction on July 1, 1982 with respect to allegations of violations of Section 2 by the State's plans.

Crucial to where we are today has been the role played by the Special Master. This Court is persuaded that if he had not been appointed, and if he had not so ably and vigorously carried out his assignment a) there might well not be in place today State apportionment plans which have survived scrutiny by the Attorney General, and b) there probably would be little possibility of holding elections this year in New York State from districts which are based on 1980 census data.

Time is now of the essence. It is essential that the election process be put in place immediately, or elections this year will not take place. The Court recognizes that claims have been made that certain portions of New York State's plans violate Section 2 of the Voting Rights Act. It deems it essential, however, that the election proceed, and if full hearings were to be held now on these claims, it is the judgment of the Court that 1982 elections would not take place in New York, or in portions of New York. Among other things, persons essential to the election process would be involved in the hearings. Thus the State is to proceed with elections in the year 1982 for Congress and the State Legislature under the election laws as recently revised. Hearings or trials with respect to any alleged violations of Section 2 of the Voting Rights Act will be deferred until after November 2, 1982. For the same reasons that the hearings are deferred, all discovery with respect to such matters is deferred until after November 2, 1982.

Since the plans under which 1982 elections will be held in New York State are State-enacted plans and not Court plans or plans developed by the Special Master, this order should not be construed as constituting approval of those plans by the Court. They are, as set forth above, subject to post-election scrutiny with respect to alleged violations of Section 2 of the Voting Rights Act. It should be noted that the Court is presently unaware of any claims of violations, with respect to the State-enacted plans, of the one-man, one-vote requirements of the U.S. Constitution.

Since the Court is not presently passing upon the validity of the Voting Rights Act Section 2 claims, all persons involved in election races in districts where such claims have been asserted, or in districts adjacent thereto, should be on notice that if, after hearing or trial, those claims should be established, this Court in the exercise of its equitable powers may require that those districts be redrawn and that new elections be held.

The Court thanks the Special Master, Robert P. Patterson, Jr., for the tremendous contribution that he and his associates have made to the common weal of this State by his yeoman efforts of

the past two and one-half months. Mr. Patterson is directed, as promptly as possible, on two days' notice to all parties, to submit an application for an award of fees and expenses, to be assessed against the State or appropriate parties.

This Court retains continuing jurisdiction of this matter for purposes of insuring that elections take place this year in accordance with the Constitution and federal law in districts based upon 1980 census data.

SO ORDERED.

Lawrence W. Pierce, Circuit Judge
Robert J. Ward, District Judge
Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
July 7, 1982